In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 135

PANAMA REFINING COMPANY ET AL., PETITIONERS,

v.

A. D. RYAN, S. D. BENNETT, AND J. HOWARD MARSHALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The respondents do not oppose the granting of the petition.

The questions presented relate to the validity of Section 9 (c) of the Act of June 16, 1933, known as the National Industrial Recovery Act, and to the validity and applicability to petitioners of Regulations IV, V, and VII, as amended, promulgated by Harold L. Ickes, Secretary of the Interior, in aid of the enforcement of Section 9 (c). The pertinent provisions of the National Industrial Recovery Act are set forth in Appendix A, *infra*, p. 6, and the regulations, as amended, are set forth in Appendix B, *infra*, pp. 7–9.

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The court below, reversing the decree of the District Court of the United States for the Eastern District of Texas, held that Section 9 (c) is valid and that the regulations are valid and enforceable against petitioners. Respondents believe that the decision of the court below is correct, but do not, in view of the importance of the questions involved, oppose the issuance of the writ of certiorari.

Amended regulations recently promulgated by the Secretary of the Interior do not appear to render the cause moot

Since the decision below was handed down, the regulations involved herein have been amended. The Government wishes to call the attention of the Court to these changes and their possible bearing upon the propriety of the request for certiorari.

The Secretary of the Interior by an order dated July 20, 1934 (as amended by his order of July 24, 1934), amended the prior regulations promulgated by him to carry out the provisions of Section 9 (c) by substituting therefor new regulations insofar as future transactions are concerned. The new regulations are set forth in Appendix C, *infra,* pp. 10–13.

The new regulations embody substantially all the requirements of the three earlier regulations (IV, V, VII) under attack in this cause. The earlier regulations required monthly reports by producers of petroleum (Reg. IV), and by purchasers, shippers, and refiners of petroleum (Reg. V), containing certain data. The new regulations require such

producers, purchasers, shippers, and refiners to keep and preserve the same data (Reg. V, A, B) and to report to the Secretary of the Interior from time to time, as called for by him (Reg. VI). The only obligation imposed by the earlier regulations and not by the present ones is that the reports of producers, purchasers, etc., shall contain a declaration that none of the petroleum which they have produced and shipped, or received and disposed of, was produced or withdrawn from storage in excess of the amount permitted by any State law or valid regulation or order prescribed thereunder. The provisions of the earlier regulations (Reg. VII) that all persons subject to Section 9 (c) and to regulations issued thereunder shall keep and maintain, available for inspection by the Department of the Interior, adequate books and records of all transactions involving the production and transportation of petroleum, are continued in force by the new regulations (Regs. IV and V).

A suit attacking the validity of an order by a Federal regulatory body does not become moot because of expiration of the order, where the order is a matter of public interest and is likely to be repeated or renewed. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 514–516; *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U.S. 433, 452. See also *McGrain* v. *Daugherty,* 273 U.S. 135, 181–182. *A fortiori* the case is not moot where, as here, the

order under attack is merely modified and substantially all of its pertinent provisions are continued in effect by the amending order.

Furthermore, the suit was brought to enjoin prosecution of past as well as future violations of certain regulations of the Secretary of the Interior (R. 7, 9, 12). Petitioners' liability for prior violations of the original regulations is still at issue in this case, since the new regulations promulgated by the Secretary on July 20, 1934, are substituted for the earlier ones only " insofar as future transactions thereby or hereby regulated are concerned." In *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U.S. 433, *supra,* which held that a suit to enjoin an order of the Interstate Commerce Commission fixing reasonable transportation rates did not become moot upon expiration of the order, the Court referred (p. 452) to " the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined."

Apart from the foregoing considerations, the validity of Section 9 (c) is an issue in the case not affected by the change in the regulations. The bill of complaint alleges the invalidity of this section (R. 5). The decree entered by the District Court enjoins the enforcement of " any rule or regulation promulgated by the Secretary of the Interior " under the National Industrial Recovery Act insofar as it applies to the production, refining, storage

or transportation of petroleum in intrastate commerce (R. 162). The decree also enjoins interfering in any way with the conduct of petitioners' business by reason of the provisions of that Act "or regulations promulgated thereunder" (R. 163). The Circuit Court of Appeals in its opinion sustained the validity of Section 9 (c) (R. 231–232), and one of the grounds upon which petitioners rely for the allowance of a writ of certiorari is that this holding is erroneous.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
HAROLD M. STEPHENS,
Assistant Attorney General.
CARL MCFARLAND,
M. S. HUBERMAN,
CHARLES H. WESTON,
Special Assistants to the Attorney General.
NATHAN R. MARGOLD,
Solicitor of the Department of the Interior.
CHARLES FAHY,
First Assistant Solicitor of the Department of the Interior.

AUGUST 1934.

APPENDIX A

The National Industrial Recovery Act, approved June 16, 1933, c. 90, 48 Stat. 195 (U.S.C. Sup. VII, Title 15, Secs. 702(b), 709(c), 710(a)) provides in part:

> SEC. 2 (b). The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title.
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> SEC. 9 (c). The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both.
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> SEC. 10 (a). The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and fees for licenses and for filing codes of fair competition and agreements, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500, or imprisonment for not to exceed six months, or both.

Appendix B

The three regulations by the Secretary of the Interior involved in the present litigation read as follows:

IV

Every producer of petroleum shall file a statement under oath, sworn to before any duly authorized State or Federal officer, not later than the fifteenth day of each and every calendar month, beginning with August 15, 1933, with the Division of Investigations of the Department of the Interior, unless otherwise ordered to report at more frequent intervals by the Division, which statement shall contain the following information for the given field involved covering the preceding calendar month:

(1) The residence and post-office address of the producer.

(2) The location of his producing properties and wells, the allowable production for each property and well as prescribed by the proper State agency for both property and wells.

(3) The daily production in barrels produced from each property and well.

(4) A report of all deliveries of petroleum showing the names and places of business of all persons to whom such petroleum was delivered whether purchasers, consignees or transporting agencies, and the quantity involved in each delivery, transportation or other disposition thereof, together

with a report of all petroleum in storage, wherever located, at the beginning and at the end of said calendar month, the place of storage and the amount in storage at each place.

(5) A declaration that no part of the petroleum or the products thereof produced and shipped has been produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law, or valid regulation or order prescribed thereunder by any Board, Commission, Officer, or other duly authorized agency of the State in which the petroleum was produced. (As amended by Order of July 25, 1933.)

V

Every purchaser of petroleum, shipper (other than a producer) of petroleum, and refiner of petroleum (including all persons engaged in the processing of petroleum in any manner), shall file a statement under oath sworn to before any duly authorized State or Federal officer, not later than the fifteenth day of each and every calendar month beginning with August 15, 1933, with the Division of Investigations of the Department of the Interior, unless otherwise ordered to report at more frequent intervals by the Division, which statement shall contain the following information for the preceding calendar month:

(1) The residence and post-office address of the purchaser, shipper, refiner, or processor.

(2) The place and date of the receipt, the names and business addresses of the producers and/or other parties from whom the pe-

troleum was received, the amount received of such petroleum and the amount of petroleum held in storage or otherwise on the last day of the calendar month next preceding the period covered by the report.

(3) The disposition of said petroleum, including the place and date of delivery, the amount delivered, the names and business addresses of the consignees to whom delivered, the transporting agencies, and the amount of petroleum held in storage or otherwise at the end of said calendar month.

(4) A declaration that to the best of the information and belief of the affiant, none of the petroleum received and/or disposed of was produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder by any Board, Commission, Officer, or duly authorized agency of the State in which the petroleum was produced. (As amended by Order of July 25, 1933.)

VII

All persons, natural or artificial, embraced within the terms of Section 9 (c) of the National Industrial Recovery Act (Public No. 67, 73rd Congress) and the Executive orders and regulations issued thereunder, shall keep and maintain available for inspection by the Division of Investigations of the Department of the Interior adequate books and records of all transactions involving the production and transportation of petroleum and the products thereof.

APPENDIX C

The regulations promulgated by the Secretary of the Interior on July 20, 1934, as amended by him on July 24, 1934, provide in part as follows:

> By virtue of and pursuant to the authority vested in me by Sections 9 (c) and 10 (a) of Title I of the Act of Congress entitled "The National Industrial Recovery Act" approved June 16, 1933 (48 Stat. 195) and the executive orders of the President of the United States No. 6199 (July 11, 1933) and No. 6204 (July 14, 1933) issued pursuant to such legislation, the regulations and amendments thereto promulgated by me on July 15, 1933, July 25, 1933, August 2, 1933, August 21, 1933, April 6, 1934, and May 21, 1934, pursuant to said authority are hereby amended by substituting therefor the following regulations insofar as future transactions thereby or hereby regulated are concerned:
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> IV
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> All persons engaged in producing, refining, reclaiming, shipping, storing, transporting, buying or selling, or otherwise dealing in or handling petroleum or the products thereof shall permit any officer, agent, or employee of the Division of Investigations of the Department of the Interior to enter upon their properties, plants, or facilities and to examine all of the books and records kept or required to be kept in accordance

with these Regulations and all other books, papers, records, vouchers, run tickets, bills of lading, way-bills, charts, memoranda, or other documents which are used by them in the process of producing, storing, refining, reclaiming, transporting, handling or otherwise dealing with petroleum or the products thereof, * * *.

V

From the date of approval of these Regulations the following records shall be kept and preserved accurately and completely, showing the complete details of each transaction as follows:

A. By producers:

* * * * *

(3) An opening and closing inventory of the crude petroleum on hand each 24 hour day.

(4) The daily production in barrels of petroleum produced from each lease and well (estimated as to wells which are produced into common tankage and of which no separate gauge is made) with a notation of the allowance made for basic sediment and water, and the tanks, identified by number, into which the petroleum was produced.

(5) The amount of crude petroleum consumed, refined or processed upon the property daily.

(6) A daily record of all deliveries of crude petroleum or products thereof, showing the names and places of business of all persons to whom such petroleum or products thereof was delivered, whether purchasers, consignees or transporting agencies, the quantity involved in each delivery, transportation or other disposition, the identity of

the means of transportation by which the petroleum or products thereof was removed, and the identifying numbers of tenders where tenders may be required by State regulatory bodies or by orders issued under these Regulations.

B. By Every Purchaser, Refiner, Storer, Shipper or Consignor of Petroleum or Petroleum Products, and by Every Person dealing in Petroleum or Petroleum Products as a Factor, Broker, Buyer, or Seller:

(1) An opening and closing inventory of crude petroleum and petroleum products on hand each 24 hour day.

(2) The daily receipts of crude petroleum and the products thereof showing the amount received, the place and date of each receipt, the tanks identified by number into which received, the names and addresses of all producers or other persons from whom the crude petroleum and the products thereof were received, and a description identifying the transporting agency by which received.

(3) The amount of crude petroleum and the products thereof used or otherwise disposed of daily showing the amount run to stills and the amount and type of petroleum products produced.

(4) A daily record of all deliveries of petroleum and the products thereof including the names and addresses of purchasers and a description identifying the transporting agency delivering such petroleum and petroleum products, and the identifying numbers of tenders where tenders may be required by State regulatory bodies or by orders issued under these Regulations.

VI

From time to time or periodically as called for by the Secretary of the Interior sworn reports on forms approved by the Secretary of the Interior shall be filed by producers, purchasers, refiners, reclamation plants, transporting agencies, shippers, or other persons dealing in or handling petroleum or its products. Each such report when called for shall show the full and accurate data required completely to fill out such form, accurately and fully reporting the data called for from the records required to be kept under Regulation V above.

U. S. GOVERNMENT PRINTING OFFICE: 1934